

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ERIC WRIGHT,

Case No. C09-5718RBL

Plaintiff,

## REPORT AND RECOMMENDATION

V.

MICHAEL ALBERTS, *et al.*,

**NOTED FOR:**  
February 12, 2010

## Defendants.

This Civil Rights Action filed pursuant to 42 U.S.C. § 1983 has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4.

On December 1, 2009, the court granted plaintiff leave to proceed in forma pauperis (Dkt. # 3). The court also entered an Order to Amend the Action or Show Cause why the action should not be dismissed (Dkt. # 5). Plaintiff is challenging his current incarceration (Dkt. # 1, proposed complaint). The order gave plaintiff until January 1, 2010 to respond. As of January 20, 2010, there has been no response. Accordingly the court enters this Report and

## REPORT AND RECOMMENDATION- 1

1 Recommendation that this action be dismissed WITHOUT PREJUDICE for failure to comply  
2 with a court order and failure to cure the defects in the complaint.

3 It should also be noted that the allegations in the complaint call into question the validity  
4 of a criminal conviction. For instance, plaintiff alleges he was forced to plead guilty to criminal  
5 charges due to the use of “false” information. Plaintiff also alleges he was denied exculpatory  
6 evidence during the discovery phase of his criminal prosecution. These claims cannot be  
7 brought in this civil suit, which asks for monetary damages, until and unless the underlying  
8 criminal conviction is either reversed, expunged, invalidated or impugned by the grant of a writ  
9 of habeas corpus. Heck v. Humphrey, 512 U.S. 477, 489 (1994). The court stated:

10 Under our analysis the statute of limitations poses no difficulty while the state  
11 challenges are being pursued, since the § 1983 claim has not yet arisen. . . . [A]  
12 § 1983 cause of action for damages attributable to an unconstitutional conviction  
13 or sentence does not accrue until the conviction or sentence has been invalidated.

14 Id. Plaintiff is fully aware of this requirement as it was the basis for dismissal of two previous  
15 related lawsuits. *See* C08-5388RBL and C08-5603RJB.

16 Additionally, plaintiff names several individuals in his Complaint who do not appear to  
17 be proper defendants. To state a claim under 42 U.S.C. § 1983, a complaint must allege that (a)  
18 the conduct complained of was committed by a person acting under color of state law and that  
19 (b) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution  
20 or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled on other*  
21 *grounds*, Daniels v. Williams, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to  
22 remedy an alleged wrong only if both of these elements are present. Haygood v. Younger, 769  
23 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). First, plaintiff has failed to  
24 show how Defendants William Ferrell and Antonio Hill personally participated in any  
25 wrongdoing or acted under color of state law. Plaintiff names these individuals in the caption of  
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1 the Complaint, but does not allege any facts showing how they personally participated in causing  
2 any deprivation of plaintiff's civil rights. A plaintiff must allege facts showing how each  
3 individually named defendant caused or personally participated in causing the harm alleged in  
4 the complaint. Arnold v. IBM, 637 F.2d 1350, 1355 (9th Cir. 1981). Moreover, these two  
5 defendants are named as attorneys, who presumably represented plaintiff in the underlying  
6 criminal matter. Generally, criminal defense attorneys, including public defenders, are  
7 considered private parties who did not act under color of state law. Polk County v. Dodson, 454  
8 U.S. 312, 317-18 (1981).

10 Plaintiff names Kawayne Lund, a state county prosecutor, as a defendant.  
11 Prosecutors are entitled to immunity from liability for damages under § 1983. Imbler v.  
12 Pachtman, 424 U.S. 409, 427 (1976). Prosecutorial immunity protects a prosecutor who "acts  
13 within his or her authority and in a quasi-judicial capacity." Kalina v. Fletcher, 522 U.S. 118  
14 1997); Ashelman v. Pope, 793 F.2d 1072, 1076 (*citing Imbler*, 424 U.S. at 430-31). "If the  
15 prosecutor acts as an advocate 'in initiating a prosecution and in presenting the State's case,'  
16 absolute immunity is warranted." Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d  
17 675, 678 (9th Cir. 1984) (*quoting Imbler*, 424 U.S. at 430-31). Prosecutorial immunity applies  
18 "even if it leaves 'the genuinely wronged defendant without civil redress against a prosecutor  
19 whose malicious or dishonest action deprives him of liberty.'" Ashelman, 793 F.2d at 1075  
20 (citations omitted).  
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22 CONCLUSION  
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24 Plaintiff has failed to cure the defects in his complaint and failed to comply with a court  
25 order. Accordingly, this action should be DISMISSED WITHOUT PREJUDICE.  
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1 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Fed. R. Civ. P., the parties shall  
2 have fourteen (14) days from service of this Report to file written objections. See also Fed. R.  
3 Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of  
4 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule  
5 72(b), the clerk is directed to set the matter for consideration on February 12, 2010, as noted in  
6 the caption.  
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8 Dated this 20<sup>th</sup> day of January, 2010.  
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12 J. Richard Creatura  
13 United States Magistrate Judge  
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